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IN THE

Supreme Court of the United States

October Term, 1966.

No. 609.

GEORGE BARROW, a/k/a "Skinny Barrett", FRED DiPATRIZIO, a/k/a "Flivvie the Fish", a/k/a "Whispers", JOSEPH MATTIA, a/k/a "Gassy", and PASQUALE PILLO, a/k/a "Husky",

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
CITATION TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	7
Legal Proceedings	7
Summary of Evidence	9
REASONS FOR GRANTING THE WRIT	11
1. The Statute Does Not Reach the Conduct Here Involved	12
2. If the Statute Reaches This Conduct, It Is Unconstitutional	16
3. The Evidence Was Insufficient to Show Petitioners' Knowledge of the Interstate Aspects of the Conspiracy	18
4. The Evidence Was Insufficient to Show Knowledge That Interstate Travel Was a Crime	21
5. The Trial Court Admitted Testimony Which Was the "Fruit of the Poisoned Tree"	21
6. The Trial Court Should Have Granted a New Trial and Severance	25
7. Grand Jury Testimony Was Used Improperly to Cross-Examine One Witness and as "Past Recollection Recorded" of Another	28
CONCLUSION	30

INDEX (Continued).

Page

APPENDIX A—Opinion of United States Court of Appeals for the Third Circuit (in All Appeals) 31

APPENDIX B:

Judgment of United States Court of Appeals for the Third Circuit (in Appeal No. 15093) 41

Judgment of United States Court of Appeals for the Third Circuit (in Appeal No. 15095) 42

Judgment of United States Court of Appeals for the Third Circuit (in Appeal No. 15096) 43

Judgment of United States Court of Appeals for the Third Circuit (in Appeal No. 15097) 44

APPENDIX C—Order of United States Court of Appeals for the Third Circuit (in All Appeals) 45

TABLE OF CASES CITED.

	Page
Bass v. United States, 324 F. 2d 168 (8th Cir. 1963)	13, 18
Brooks v. United States, 267 U. S. 432 (1925)	16
Burke v. United States, 328 F. 2d 399 (1st Cir. 1964), cert. den. 379 U. S. 849 (1964)	23
Caminetti v. United States, 242 U. S. 470 (1917)	16
Champion v. Ames, 188 U. S. 321 (1903)	16
Coplon v. United States, 191 F. 2d 749 (D. C. Cir. 1951), cert. den. 342 U. S. 926 (1952)	23
Costello v. United States, 365 U. S. 265 (1961)	23
Coulter Funeral Home, Inc. v. Cherokee Life Insurance Co., 32 F. R. D. 358 (E. D. Tenn. 1963)	15
Delli Paoli v. United States, 352 U. S. 232 (1957)	27
Elizabeth Hospital, Inc. v. Richardson, 289 F. 2d 167 (8th Cir. 1959)	15
Fahy v. Connecticut, 375 U. S. 85 (1963)	22
Gibbons v. Ogden, 9 Wh. 1 (U. S. 1824)	16
Hoke v. United States, 227 U. S. 308 (1913)	16, 17
Hotel Phillips, Inc. v. Journeymen Barbers Union, 195 F. Supp. 664 (W. D. Miss. 1961), aff'd per curiam, 301 F. 2d 443 (8th Cir. 1962)	15
Ingram v. United States, 360 U. S. 672 (1959)	20
In re Rapier, 143 U. S. 110	16
Jackson v. Denno, 378 U. S. 368 (1964)	26
Jones v. United States, 362 U. S. 257 (1960)	24
Kelly v. Illinois Bell Tel. Co., 325 F. 2d 148 (7th Cir. 1963)	13, 18
Ker v. California, 374 U. S. 23 (1963)	21
Lieberthal v. North Country Lanes, Inc., 221 F. Supp. 685 (S. D. N. Y. 1963)	14
Marshall v. United States, 355 F. 2d 999 (9th Cir. 1966)	13
McLindon v. United States, 329 F. 2d 238 (D. C. Cir. 1964)	23
Nardone v. United States, 308 U. S. 338 (1939)	22
Page v. Work, 290 F. 2d 293 (9th Cir. 1961)	15
People v. Aranda, 63 Cal. 2d 518, 407 P. 2d 265 (1965)	27

TABLE OF CASES CITED (Continued).

Page

Schaffer v. United States, 362 U. S. 511 (1960) 27
Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920) 21, 22
Simmons v. Zerbst, 18 F. Supp. 929 (N. D. Ga. 1937) 16, 17
Smith & Bowden v. United States, 324 F. 2d 879 (D. C. Cir. 1963) 22, 23
State v. Young, 46 N. J. 152, 215 A. 2d 352 (1965) 27
Stirone v. United States, 361 U. S. 212 (1960) 16, 17
The Lottery Case, 188 U. S. 321 16
Tripp v. United States, 295 F. 2d 418 (10th Cir. 1961) 25
Turf Center, Inc. v. United States, 325 F. 2d 703 (9th Cir. 1963) 13, 18
United States v. Agueci, 310 F. 2d 817 (2d Cir. 1962) 20
United States v. Azar, 243 F. Supp. 345 (E. D. Mich. 1964) .. 13
United States v. Barrow, 212 F. Supp. 837 (E. D. Pa. 1962) 21
United States v. Bergland, 318 F. 2d 159 (7th Cir. 1963), cert. den. 375 U. S. 861 (1963), rev'g 209 F. Supp. 547 (E. D. Wisc. 1962) 13, 18
United States v. Bozza, 35 U. S. L. Week, 2114 (2d Cir. Aug. 1, 1966) 27
United States v. Compton, 355 F. 2d 872 (6th Cir. 1966) 13, 14
United States v. Crimmins, 123 F. 2d 271 (2nd Cir. 1941) 19
United States v. Green, 246 F. 2d 155 (7th Cir 1957) 20
United States v. Hawthorne, 356 F. 2d 740 (4th Cir. 1966), cert. den. 86 S. Ct. 1344 (1966) 13, 14, 17
United States v. Honeycutt, 311 F. 2d 660 (7th Cir. 1962) 13, 14, 18
United States v. Kahriger, 210 F. 2d 565 (3d Cir. 1954) 20
United States v. Kahriger, 345 U. S. 22 (1953) 16
United States v. Kubacki, 237 F. Supp. 638 (E. D. Pa. 1965) 13
United States v. Massiah, 307 F. 2d 62 (2d Cir. 1962) 21
United States v. Ryan, 213 F. Supp. 763 (D. Colo. 1963) ..13, 16, 18
United States v. Smith, 209 F. Supp. 907 (E. D. Ill. 1962) ..13, 18
United States v. Spino, 345 F. 2d 372 (7th Cir. 1965) 13

TABLE OF CASES CITED (Continued).

	Page
United States v. Sweeney, 262 F. 2d 272 (3d Cir. 1959)	20
United States v. Teemer, 214 F. Supp. 952 (N. D. Wa. Va. 1963)	13, 18
United States v. Yacquinta, 204 F. Supp. 276 (N. D. W. Va. 1962)	13, 18
United States v. Zambito, 315 F. 2d 266 (4th Cir. 1963), cert. den. 373 U. S. 924 (1963)	13, 18
Wong Sun v. United States, 371 U. S. 471 (1963)	22

MISCELLANEOUS.

	Page
78 Harv. L. Rev. 211, 213 (1964)	27
Hearings, Senate Committee on the Judiciary, 87th Congress, First Session, particularly pages 3-6, 16	15
Hopps Act, 18 U. S. C. § 1951	16
House Report No. 966, to accompany S. 1653, 87th Congress, First Session, August 17, 1961	15
U. S. Constitution:	
Article I, Section 8, Clause 3	3, 5
Amendment IV	4, 5
Amendment V	3, 5
Amendment IX	3, 6, 16
Amendment X	3, 6, 16
United States Code:	
Title 18, Section 1084	18
Title 18, Section 1952	6, 19
Title 28, Section 1254(1)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No.

GEORGE BARROW, A/K/A "SKINNY BARRETT",

FRED DiPATRIZIO, A/K/A "FLIVVIE THE FISH", A/K/A "WHISPERS",

JOSEPH MATTIA, A/K/A "GASSY", AND PASQUALE PILLO, A/K/A "HUSKY",

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on July 18, 1966.

CITATION TO OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 229 F. Supp. 722 (E. D. Pa. 1964).[1] The opinion of the Court of Appeals for the Third Circuit (App. A, *infra*, pp. 31-40) [2] has not yet been offcially reported. The opinion of the District Court passing upon pretrial motions in this case is reported in 212 F. Supp. 837 (E. D. Pa. 1962).[3]

JURISDICTION.

The judgments of the Court of Appeals (App. B, *infra*, pp. 41-44) were entered on July 18, 1966. A timely petition for rehearing was denied on August 30, 1966 (App. C, *infra*, p. 45). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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1. It is also printed at pages 510a-537a of the Appendix for Appellants printed for the court below, nine copies of which have been filed with this Petition. References thereto will be designated as "Appt. Append. 510a-537a." References to citations printed in the Appendix for Appellees, printed by the government for the court below, nine copies of which have also been filed with this Petition, will be designated as "Appee. Append. —b."

2. "App." references are to the Appendices to this Petition.

3. Appt. Append. 68a-88a.

QUESTIONS PRESENTED.

1. Where a dice game, illegal under state law, is operated wholly within a state, but where some of the employees live outside the state and a few customers travel from neighboring states to attend the game, and where a federal statute prohibits interstate travel in aid of local gambling enterprises, may the local operators of the game and the out-of-state employees be convicted of conspiring to violate that law, and may the out-of-state employees be convicted of substantive violations of that law, without any evidence that the interstate travel was necessary to and aided the local gambling operation?

2. If the above conduct is encompassed by the statute, under those facts does the statute constitute an unconstitutional attempt by Congress to regulate or punish local crimes in excess of its powers conferred under the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, and thus in violation of the Ninth and Tenth Amendments to the Constitution, and render the statute unconstitutionally vague in violation of the due process clause of the Fifth Amendment?

3. Where Petitioners were the operators or employees of a gambling business illegal under state law, which had been established prior to the enactment of a federal statute prohibiting interstate travel in aid of such a business, and where the evidence shows that the interstate travel ceased shortly after passage of the federal law, can their convictions for conspiring to violate the federal law be sustained without proof of their knowledge of the interstate aspects?

4. Under the aforesaid circumstances, can convictions of Petitioners for the substantive crimes of interstate travel in aid of the local gambling enterprise be sustained without proof of their knowledge of the existence of the law?

5. Where the court has held that there was an illegal search of the premises, because of an improper entry into the premises, does the admission into evidence of the testimony of the following witnesses constitute "fruits of the poisoned tree" in violation of the Fourth Amendment:

(a) where one witness was found on the premises following the illegal entry by federal agents, and where he admitted at trial that he would not have testified if he had not been found on the premises, whether or not the prosecutor may have had independent information as to his identity?

(b) where one witness was found on the premises following the illegal entry by the federal agents, and he gave statements as a result of the coercive atmosphere of the illegal raid, but he testified that he would have answered questions for the agents even if he had not been found at the raid?

(c) where two witnesses were stopped at the front door while leaving the premises, by officers who were entering the premises to make the raid which was held to be illegal?

(d) where the nickname of one defendant, not arrested on the premises, was learned from an unidentified "confidential informant" who was seized in the raid, and the identity of the defendant was later discovered from the leads thus uncovered, and a statement was taken from that defendant after indictment of the defendants, and was introduced at the trial?

6. Where 14 defendants were tried on a charge of conspiracy, with some additionally charged with substantive violations and others with aiding and abetting those violations, and during the trial there is admitted into evidence testimony admissible against some but inadmissible against

others and prejudicial to them, have the Petitioners been deprived of a fair trial even though the jury has been instructed as to the limited effect of such testimony, and must their motions for severance be granted?

7. May the prosecution plead surprise and cross-examine its own witness, utilizing testimony he gave before the grand jury as substantive evidence, even though the prosecution knew in advance that the witness would be uncooperative; and may the prosecution utilize the grand jury testimony of another witness as his "past recollection recorded" without a proper foundation and even though the grand jury testimony was given more than three months following the events to which he testified?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution:

Article I, Section 8, Clause 3 provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."

Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

Amendment V provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment IX provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment X provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

United States Code, Title 18, Section 1952 provides:

> "(a) Whoever travels in interstate or foreign commerce or uses any facilities in interstate or foreign commerce, including the mail, with intent to . . .
>
> (3) Otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and therefore performs or attempts to perform any of the acts specified in Subparagraphs (1), (2), and (3), shall be fined not more than $10,000.00 or imprisoned for not more than fixe years, or both.
>
> (b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violations of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States."

STATEMENT OF THE CASE.

Legal Proceedings.

This petition arises from convictions under a 26 count indictment (Appt. Append. 23a-57a) which charged 15 defendants with conspiring to violate the federal law prohibiting travel in interstate commerce to facilitate violation of local laws, and which charged some of them with substantive offenses of traveling in interstate commerce in violation of that Act, and others with aiding or abetting the forbidden interstate travel. The first count charged all 15 defendants with conspiracy.[4] Nine of those defendants were also charged in the remaining counts with substantive acts of interstate travel, and five other defendants were charged with aiding and abetting those various acts of travel. One defendant, who was charged only with conspiracy, was severed and the trial proceeded without him.

The remaining 14 defendants were tried before the Honorable Joseph S. Lord, III, and a jury in a trial which lasted almost five weeks. At the close of the government's case, the trial judge directed the acquittal of one defendant who had been named in all counts (Gatto), and also dismissed as to all defendants one count of the indictment charging a substantive offense. The jury acquitted one defendant named in the conspiracy and in one substantive count (Grassi). One defendant, who was found guilty of conspiracy as well as aiding and abetting in 21 counts, died a few weeks after the verdict (DiCaprio), and the action was abated as to him. The remaining 11 defendants (including the four Petitioners here) were all convicted of

4. In addition to the 15 indicted, there were 41 others named as co-conspirators and "divers other persons to the Grand Jury unknown" (Appt. Append. 23a-24a). The Bill of Particulars filed by the government set forth five additional alleged but unindicted co-conspirators (Appt. Append. 94a).

conspiracy; four of them (including Petitioners Barrow and Pillo) additionally were found guilty of aiding and abetting on 21 of those remaining counts and not guilty on three; two who were additionally charged with one substantive count each were found not guilty; five (including Petitioners DiPatrizio, Mattia and Pillo) charged with various substantive offenses were found guilty.

Motions for new trial and for verdicts of acquittal were filed on behalf of all of the convicted defendants. The trial court refused the verdicts of acquittal, but granted the motions for a new trial on behalf of those defendants who had been found guilty of aiding and abetting (Appt. Append. 510a-537a). Of the 11 remaining defendants who had been found guilty on one or more counts, sentences were suspended as to six. Only the remaining five appealed. The Court of Appeals for the Third Circuit reversed the conviction of one defendant (Bonanno), who had been found guilty of conspiracy and aiding and abetting.

Thus, these Petitioners were found guilty of the following offenses:

Barrow: conspiracy (count I); aiding and abetting (counts III to XI and XV to XXVI), with new trial granted as to counts III to XI and XV to XXVI.

DiPatrizio: conspiracy (count I); interstate travel (counts IX to XI).

Mattia: conspiracy (count I); interstate travel (count XIII).

Pillo: conspiracy (count I); interstate travel (counts III to V); aiding and abetting (Counts VI to XI and XV to XXVI), with new trial granted as to counts VI to XI and XV to XXVI.

Summary of Evidence.

About one o'clock A. M. on January 20, 1962, more than 50 federal agents raided premises 235-237 Cherry Street, Reading, Pennsylvania. The agents were armed with warrants for the arrest of ten individuals (only five of whom were found on the premises, and only two of those five were among the 15 indicted). After breaking in, one of the agents left the scene, went to an auto parked about a block away in which a United States Commissioner was waiting by prearrangement, obtained his signautre on a search warrant, and returned to the premises with that warrant. Approximately 150 persons were found on the premises, all of whom were detained and questioned, and some of whom were placed under arrest. The tables, dice and other paraphernalia located on the premises, including substantial sums of money found on the tables, under the floorboards and on some of the individuals, were seized.

A Federal Grand Jury brought in a six count indictment against seven defendants, charging them with traveling in interstate commerce in aid of racketeering enterprises, and with aiding and abetting that travel. However, that indictment was later withdrawn and the present indictment was filed in its place naming eight others in addition to the original seven defendants.

Various motions were filed on behalf of all the defendants, including motions to dismiss the indictment, motions for a bill of particulars, motions for severance, and motions to suppress the evidence seized in the raid. After a hearing before Honorable Joseph S. Lord, III, the motion to suppress the evidence was granted, and the motion to dismiss denied. 212 F. Supp. 837 (E. D. Pa. 1962) (Appt. Append. 68a-88a). An Order was entered granting the motion of one defendant (Comito) for severance, but the remaining motions for severance were denied. The government subsequently filed a bill of particulars plus two amendments thereto (Appt. Append. 89a-102a).

The trial commenced before Judge Lord on September 10, 1963, and lasted almost five weeks. After the jury verdict, motions for a new trial and for acquittal were filed on behalf of all defendants as to all counts on which they had been convicted. After submission of briefs and hearing arguments, Judge Lord denied the motions for acquittal, but granted the motions for new trial as to all defendants convicted of aiding and abetting. 229 F. Supp. 722 (E. D. Pa. 1964) (Appt. Append. 510a-537a). Sentences were imposed, but subsequently the court on its own motion reduced some of the sentences (Appt. Append. 539a-545a).

The evidence adduced at the trial, considered most strongly against defendants, tended to show that a crap game was being run at the premises in Reading from early 1960 until approximately June, 1961. At that time the game closed down for several months, reopening in November, 1961. It continued until the raid in January, 1962. The federal statute prohibiting travel in interstate commerce in aid of local gambling operations was approved September 13, 1961. The evidence tended to show that the defendants did not become aware of the significance of this Act until January, 1962, and that when they did, the New Jersey employees ceased attending.

Of the 15 defendants named in the indictment, only three (Petitioner Barrow, DiCaprio and Loscalzo) were arrested on the premises at the time of the raid. Of these 15 defendants, five (including petitioner Barrow) were residents of Pennsylvania and were not charged with traveling in interstate commerce.

REASONS FOR GRANTING THE WRIT.

This case arises out of one of the earliest prosecutions instituted under the federal statute enacted in 1961 prohibiting interstate travel in aid of local gambling activities. Although several other cases in other federal courts have raised the question of the constitutionality of the statute, in this case the statute was applied in an unusual manner. Some of the defendants were indicted as substantive violators because they traveled in interstate commerce, yet, according to the evidence, these defendants were not the principal operators of the illegal enterprise, a crap game being operated in Reading, Pennsylvania; these defendants were simply a few of the employees who happened to live in New Jersey and traveled to Reading to work. The defendants who, according to the evidence, were the operators and managers of the game, were residents of Pennsylvania, and did not cross state lines; they were charged with aiding and abetting the other defendants. All of the defendants were also charged with conspiring to violate the federal law. However, the evidence showed that this was not a game established after the federal law was passed. The evidence showed that the game had been in operation for several years before the federal law was passed in August, 1961. It had been closed down for physical repairs in June, 1961, and reopened in November, 1961. There was evidence that the participants did not learn of the federal law until January, 1962, and that immediately thereafter all New Jersey employees ceased participating.

Accordingly, the case poses several problems of importance to not only the Petitioners herein, but to the fair administration of criminal justice. Did Congress intend the statute to extend to this type of conduct? If it did, then is it constitutional, or is it an unconstitutional attempt to regulate and punish local crimes? Can Petitioners be convicted of conspiring to violate a law which did not exist when they first commenced their illegal conduct, without any evidence that they knew of the federal law passed thereafter, and where they terminated their conduct upon

learning of the law? Can those who crossed state lines be convicted of violating a law which they did not know existed?

In addition, the case poses several questions of trial rulings which transcend in importance the convictions of these Petitioners. Where there has been a ruling that an illegal search and seizure has occurred, can the government offer the testimony of witnesses discovered on the premises after—or simultaneously with—the illegal entry? Where a long trial involving 14 defendants takes place, and evidence inadmissible as to some defendants and highly prejudicial as to them is admitted against other defendants, with proper cautioning instructions, can the jury be expected to wipe out the prejudicial effect, or must the court grant a new trial and severance? Where the prosecutor calls a witness he knows to be reluctant, can he plead surprise and cross-examine him, utilizing testimony given by that witness before the grand jury, and have that grand jury testimony admitted as substantive evidence?

The facts pertaining to each of these questions, and a summary of the legal issues posed, follows.

1. The Statute Does Not Reach the Conduct Here Involved.

Even interpreting the evidence in the light most favorable to the government, there can be no question that the crap game which was the subject of the indictment here was conducted entirely and exclusively in Reading, Pennsylvania. There was some evidence that some of the defendants who were employed at the game (including three of these Petitioners, DiPatrizio, Mattia and Pillo) did live in New Jersey, and did travel to the game. There was also some evidence that some of the players who attended the game came from New Jersey, and even some evidence that some employees (including only two of the 15 defendants named in the indictment, none of whom are Petitioners here) did transport players from New Jersey to Reading. The evidence showed that the principal operators (allegedly including Petitioner Barrow) never left Reading.

Thus, the question posed in this case is whether the federal statute reaches the situation where the principal operators of the illegal enterprise never leave the state, and where the only interstate aspect of the operation is the crossing of state borders by some employees and some patrons—especially where there has been no evidence that any of the interestate traveling employees were indispensible to the operation of the game, and where the evidence shows that the interstate players were only a minute percentage of the attendance and there was no interstate solicitation of customers.

Although there have been several cases in the United States District Courts, and a few reaching the Court of Appeals,[5] interpreting this new federal statute, there has been none reported to date encompassing this type of conduct. Thus, this case poses squarely the important issue of whether the statute can be interpreted broadly enough to reach this conduct, as was held by the trial judge and the Courts of Appeals.

By its terms the statute requires travel with intent to facilitate the operation of an illegal gambling enterprise plus a subsequent act facilitating that game. It is not contended that the employees who lived out of state and traveled to Reading to work in the game did not ultimately aid

5. See, *e.g.*, *United States v. Hawthorne*, 356 F. 2d 740 (4th Cir. 1966), *cert. den.* 86 S. Ct. 1344 (1966); *United States v. Compton*, 355 F. 2d 872 (6th Cir. 1966); *Marshall v. United States*, 355 F. 2d 999 (9th Cir. 1966); *United States v. Spino*, 345 F. 2d 372 (7th Cir. 1965); *Turf Center, Inc. v. United States*, 325 F. 2d 703 (9th Cir. 1963); *Bass v. United States*, 324 F. 2d 168 (8th Cir. 1963); *United States v. Bergland*, 318 F. 2d 159 (7th Cir. 1963), *cert. den.* 375 U. S. 861 (1963), *rev'g* 209 F. Supp. 547 (E. D. Wisc. 1962); *United States v. Zambito*, 315 F. 2d 266 (4th Cir. 1963), *cert. den.* 373 U. S. 924 (1963); *United States v. Honeycutt*, 311 F. 2d 660 (7th Cir. 1962); *United States v. Teemer*, 214 F. Supp. 952 (N. D. W. Va. 1963); *United States v. Ryan*, 213 F. Supp. 763 (D. Colo. 1963); *United States v. Azar*, 243 F. Supp. 345 (E. D. Mich. 1964); *United States v. Kubacki*, 237 F. Supp. 638 (E. D. Pa. 1965); *United States v. Smith*, 209 F. Supp. 907 (E. D. Ill. 1962); *compare United States v. Yacquinta*, 204 F. Supp. 276 (N. D. W. Va. 1962); *Kelly v. Illinois Bell Tel. Co.*, 325 F. 2d 148 (7th Cir. 1963).

or facilitate the operation of the game; certainly a game cannot operate without employees. However, there was no evidence offered to show that the traveling employees were essential to the operation of the game, in that the game could not have operated without these employees at all, or could not have replaced them with local employees.

The government offered no proof that the employees' travel from other states was an integral part of the operation. There was only slight circumstantial evidence that many of the local defendants knew that the New Jersey defendants lived outside the state, and there was no proof, direct or circumstantial, that any of the local defendants cared in the slightest until they learned of the existence of the federal statute. It is respectfully submitted that the interstate travel involved here is so remote that the conduct is not embraced by the statute. See *United States v. Hawthorne,* 356 F. 2d 740 (4th Cir. 1966), *cert. den.* 86 S. Ct. 1344 (1966); *cf. United States v. Compton,* 355 F. 2d 872 (6th Cir. 1966).

The trial judge concluded that the statutory language requires that the *traveler* facilitate the illegal activity, not that the *travel* aid it, and the Court of Appeals held that the statute does not require that the interstate travel be essential to the unlawful activity.

It is respectfully submitted that the Seventh Circuit Court's opinion in *United States v. Honeycutt,* 311 F. 2d 660 (7th Cir. 1962), reversing the conviction of a defendant charged with violating this statute by aiding and abetting another who was allegedly his partner in the operation of a gambling room in North Carolina, lends support to the contention that the statute requires that the interstate travel be an essential element of the crime. Likewise, the decision of another federal court in *Lieberthal v. North Country Lanes, Inc.,* 221 F. Supp. 685 (S. D. N. Y. 1963), holding that crossing of state and international borders by customers of a business do not change an intrastate activity into an interstate one for purposes of regulation under the Sherman Anti-Trust Act, lends support to this conten-

tion. Also see *Hotel Phillips, Inc. v. Journeymen Barbers Union,* 195 F. Supp. 664 (W. D. Miss. 1961), *aff'd per curiam,* 301 F. 2d 443 (8th Cir. 1962); *Elizabeth Hospital, Inc. v. Richardson,* 289 F. 2d 167 (8th Cir. 1959); *Page v. Work,* 290 F. 2d 293 (9th Cir. 1961); *Coulter Funeral Home, Inc. v. Cherokee Life Insurance Co.,* 32 F. R. D. 358 (E. D. Tenn. 1963). Surely, this is no less true under the Act at bar, where the sole purpose is allegedly to assist the states in their enforcement of local police laws, despite the fact that the federal government has no federal police power, than it is as applied to the Sherman Anti-Trust Act, which arises under a clearly recognized federal power.

In addition, the legislative history of the Act shows that Congress never intended to reach this type of conduct. The statute was introduced pursuant to the recommendation of Attorney General Robert F. Kennedy, who testified at the hearings before the Senate Committee on the Judiciary that the act was intended to reach individuals who have interests in gambling operations but who live in resort towns far from the scene of operation and manage their enterprises through couriers and messengers traveling across state lines between the proprietors, the operation and other branches. According to the Attorney General, it was difficult to prosecute the principals who never appeared at the scene of operations. See Hearings, Senate Committee on the Judiciary, 87th Congress, First Session, particularly pages 3-6, 16. See also House Report No. 966, to accompany S. 1653, 87th Congress, First Session, August 17, 1961.

In the case at bar it is the obverse situation in which the government is attempting to invoke the statute. The proprietors of the operation reside at the scene of the activity; it is the employees who travel across state lines simply to come to work. Both the alleged principals and the employees are amenable to local prosecution. In effect, the prosecution here attempts to convert mere unessential employees of a local gambling operation into federal criminals, thereby converting a local gambling problem into a federal matter through the use of conspiracy and aiding

and abetting[6] provisions. This is bootstrap logic used to create federal jurisdiction.

2. If the Statute Reaches This Conduct, It Is Unconstitutional.

There can be no doubt that the federal government lacks power to regulate or punish local gambling. This is reserved to the states under the Ninth and Tenth Amendments. Federal legislation must rest on a congressional power enumerated in the Constitution, such as the taxing power or the Commerce Clause. *United States v. Kahriger,* 345 U. S. 22, 29 (1953).

Although it is conceded that Congress may constitutionally prohibit the use of interstate facilities[7] for illicit purposes, and that Congress has plenary power over interstate Commerce,[8] it is submitted that there must be some relation between the use of interstate commerce and the unlawful activities. See *United States v. Ryan,* 213 F. Supp. 763, 765 (D. Colo. 1963). Here, under the facts of this case, there is no relation between the use of interstate

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6. Of course, since the aiding and abetting convictions have been reversed, they are not presently before this Court.

7. See *United States v. Kahriger,* 345 U. S. 22, 29, esp. fn. 6, and cases cited therein. Congress may also prohibit the use of the mails for illicit purposes, under its power to establish post offices and post roads. *In re Rapier,* 143 U. S. 110; *The Lottery Case,* 188 U. S. 321.

8. *Gibbons v. Ogden,* 9 Wh. 1 (U. S. 1824); *cf. Champion v. Ames,* 188 U. S. 321 (1903); *Caminetti v. United States,* 242 U. S. 470, 491 (1917). Under this power, Congress can bar transportation of women for immoral purposes: *Camminetti v. United States, supra; Hoke v. United States,* 227 U. S. 308 (1913) (the Mann Act); it can punish interference with interstate commerce by extortion: *Stirone v. United States,* 361 U. S. 212 (1960) (the Hopps Act, 18 U. S. C. § 1951); it can prohibit the use of commerce to avoid prosecution: *Simmons v. Zerbst,* 18 F. Supp. 929 (N. D. Ga. 1937) (the Fugitive Felon Act). Congress can even use its commerce power to implement state policy by denying the use of interstate commerce in furtherance of activities unlawful under state law. *Brooks v. United States,* 267 U. S. 432 (1925).

commerce and the unlawful activities. Here the trial judge concluded that Congress has the power to make it a criminal offense to cross the state line *after* the commission of a strictly local offense, and that Congress also has the power to make it a criminal offense to cross state lines to commit a crime. Even if he is correct, to extend this reasoning to the facts at bar, where the evidence clearly showed the crossing of state lines to be merely incidental, accidental and unessential to the offense thereafter committed, would be an unconstitutional extension of the Commerce Clause into fields traditionally reserved for local enforcement. See *United States v. Hawthorne, supra.*

This Court was seriously troubled, in the *Stirone case,* 361 U. S. 212 (1960), by the suggestion that an individual could be tried and convicted for interference with possible future shipments of steel to be manufactured by a plant which was to be constructed from concrete made with sand supplied by the individual whom the defendant tried to extort. As this Court stated in the *Simmons* case, *supra,* 18 F. Supp. at 930, sustaining the Fugitive Felon Act, and citing the language of the *Hoke* case, *supra,* 227 U. S. at 321, sustaining the Mann Act:

> "There is a domain which the states cannot reach and over which Congress alone has power; and if such power be exerted to *control what the states cannot,* it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the states." (Emphasis supplied.)

Under the facts of the case at bar, however, it is clear that this Act does not attempt to reach conduct out of the reach of the states. The interstate travel involved was not an essential incident of the offense, nor did any interestate travel take place to avoid prosecution.

This case thus poses the issue squarely of whether this Court will permit federal prosecutors to utilize the federal statute to encroach upon the rights of the states to regulate

and punish local crimes in a manner which could not constitutionally be encompassed by the federal statute.

The case also poses the further question of whether such a broad interpretation, far beyond the language used by Congress, renders the statute so vague as to be unconstitutional under the Fifth Amendment.

Several other Circuit and District Courts have already sustained the constitutionality of this statute and of a related statute, 18 U. S. C. § 1084. See: *Turf Center, Inc. v. United States,* 325 F. 2d 703 (9th Cir. 1963); *Bass v. United States,* 324 F. 2d 168 (8th Cir. 1963); *United States v. Bergland,* 318 F. 2d 159 (7th Cir. 1963); *United States v. Zambito,* 315 F. 2d 266 (4th Cir. 1963); *United States v. Teemer,* 214 F. Supp. 952 (N. D. W. Va. 1963); *United States v. Ryan,* 213 F. Supp. 763 (D. Colo. 1963); *United States v. Smith,* 209 F. Supp. 907 (E. D. Ill. 1962). But compare *United States v. Yacquinta,* 204 F. Supp. 276 (N. D. W. Va. 1962); *Kelly v. Illinois Bell Tel. Co.,* 325 F. 2d 148, 152 (7th Cir. 1963) (which held that transmission of racing news does not violate this section). Nonetheless, it is respectfully submitted that in each of the above cases, the facts were such as to show a clear violation of the statute under circumstances which, unlike the case at bar, would not render the statute unconstitutional. Compare *United States v. Honeycutt,* 311 F. 2d 660 (7th Cir. 1962).

Thus, this case raises an important question of constitutional law which exceeds the importance to these Petitioners alone.

3. The Evidence Was Insufficient to Show Petitioners' Knowledge of the Interstate Aspects of the Conspiracy.

It is not suggested that the Petitioners who traveled across state lines did not know they were crossing state lines. The question here posed is whether a federal conviction of conspiracy can be sustained without any proof of knowledge on the part of the alleged co-conspirators that the object of their alleged conspiracy is a federal crime.

The conspiracy count of the indictment charged here that defendants did unlawfully, intentionally and knowingly conspire and agree to commit offenses against the United States, to wit, to violate Section 1952 of Title 18, United States Code. Since that Act requires interstate travel with the intent of facilitating the carrying on of the illegal enterprises, it is submitted that there must be proof that the defendants knew that interstate travel would take place, and it must be shown that the interstate travel was an integral part of the agreement. Otherwise, there has not been evidence of knowledge by each conspirator of all of the elements of the crime charged, as Judge Learned Hand spelled out in *United States v. Crimmins,* 123 F. 2d 271, 273 (2nd Cir. 1941):

> "And this is equally true, when the crime which the conspirators have agreed upon, is one of which they severally might be guilty though they were ignorant of the existence of some of its constituent facts. While one may, for instance, be guilty of passing a traffic light of whose existence one is ignorant, one cannot be guilty of conspiracy to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past."

Here the evidence showed that the illegal game had been started long before there was a federal statute in existence. Although the evidence showed that the game closed down for physical repairs, reopening in November, 1961, shortly after the federal statute had been passed, the evidence showed that as soon as the participants learned of the newly enacted federal statute, the interstate activities ceased entirely. Thus, the question is whether a conspiracy conviction can be sustained where the object of the conspiracy charged is to violate a federal law which did not exist when the alleged conspiracy was formed; and where the evidence showed a cessation of interstate activities shortly after the passage of the federal statute.

In addition, the evidence against Petitioner Barrow was at best highly circumstantial and capable of many interpretations. The trial judge found that Barrow was the top man on the chain of command, because, *inter alia,* there was evidence that on one occasion he had settled a dispute over the call of the dice; on one occasion he had decided whether a patron should be admitted to the game; there was some evidence offered that he used the "office"; there was some evidence (the admissibility of which was questionable) that he hired one "lugger." With little more than this circumstantial evidence, the trial judge and the Court of Appeals concluded that Barrow must have known that some of the other employees came from New Jersey, and that he was thus aware of the scope of the illegal enterprise, including its interstate aspects. It is respectfully submitted that the evidence did not show, beyond a reasonable doubt, that Barrow was a manager and promoter of this illegal enterprise. But even if this evidence were sufficient to sustain an inference of his knowledge that some of the employees traveled in interstate commerce, it is respectfully submitted that such knowledge is not the knowledge required to sustain a conviction under the Act, since there was not one word of evidence introduced that Barrow, or any other alleged co-conspirator, knew that the object of the conspiracy was interstate travel. See *Ingram v. United States,* 360 U. S. 672 (1959); *cf. United States v. Green,* 246 F. 2d 155 (7th Cir. 1957); *United States v. Sweeney,* 262 F. 2d 272 (3d Cir. 1959); also see *United States v. Kahriger,* 210 F. 2d 565 (3d Cir. 1954).

Even in cases charging conspiracy under the narcotics laws, where mere possession of the narcotics gives rise to the presumption that the possessor knows of such importation, the courts have generally concluded that there must be evidence of knowledge on the part of the conspirators of the fact that the narcotics have actually been imported. *E.g., United States v. Agueci,* 310 F. 2d 817 (2d Cir. 1962);

United States v. Massiah, 307 F. 2d 62 (2d Cir. 1962). Here, where there is no such presumption, this Court ought to require proof of knowledge of the interstate object of the conspiracy in order to sustain the convictions.

4. The Evidence Was Insufficient to Show Knowledge That Interstate Travel Was a Crime.

Three of the Petitioners were convicted of substantive acts of traveling in interstate commerce in aid of the local illegal gambling activities, as well as conspiracy. Certainly it is not contended here that these Petitioners did not know they were crossing state lines. However, it is suggested that under the federal statute here involved there must be shown knowledge that the interstate travel was prohibited by the federal statute. Without such knowledge, there could not be the requisite intent under the Act.

This case poses the question of whether the homily that "ignorance of the law is no excuse" applies where the alleged violators did not know of the federal law prohibiting interstate travel, and where shortly after the learned of it, they ceased their interstate travels. Under those circumstances, their convictions cannot properly be sustained.

5. The Trial Court Admitted Testimony Which Was the "Fruit of the Poisoned Tree."

The trial judge had granted a motion for suppression of evidence on the grounds that the raiding officers had neglected to announce their identity and purpose before breaking into the premises. *United States v. Barrow,* 212 F. Supp. 837 (E. D. Pa. 1962) (Appt. Append. 68a-88a). Since the date of that opinion, this Court has reached a similar conclusion. *Ker v. California,* 374 U. S. 23 (1963). However, during the course of the trial, the proffered testimony of several witnesses raised the issue of the effect of the suppression order and what evidence would constitute the "fruit of the poisoned tree." See *Silverthorne*

Lumber Co. v. United States, 251 U. S. 385 (1920); *Nardone v. United States,* 308 U. S. 338 (1939). The testimony of each such witness was not merely cumulative but was damaging in some specific respect. Thus, it is highly significant to the Petitioners herein whether the evidence was properly admitted. In addition, the precise issues raised here have never been decided by this Court, and bring into focus the precise scope of the "fruit of the poisoned tree" doctrine.

(a) *Smith:* The witness Smith, who was found on the premises on the night of the illegal raid, was asked the following question on voir dire and answered:

> "Q. Now, if the Government agents had come to you and there wasn't any raid, there was nothing in the paper about a raid, and they didn't find you on the premises, and if they said to you, 'Mr. Smith, we think you know something about this. Will you testify?' Would you have testified? Now do you understand the question?
>
> A. No. I wouldn't have testified." (Appt. Append. 458a-459a)

Despite this answer, and over objection of counsel, the witness was permitted to testify.

It is thus submitted that this testimony was the "fruit of the poisoned tree," and that the testimony should have been excluded. See *Wong Sun v. United States,* 371 U. S. 471 (1963), and cases therein cited. In *Fahy v. Connecticut,* 375 U. S. 85 (1963), this Court concluded that admissions of defendant induced by confrontation with evidence seized illegally were inadmissable at his trial. Testimony of a witness induced by his discovery at an illegal gambling enterprise should likewise be excluded.

If the identity of this witness had been discovered as a result of the illegal search and seizure, there would be little doubt that the testimony would be excluded as the fruit of the poisoned tree. See *Wong Sun v. United States, supra;* also *compare Smith & Bowden v. United States,* 324

F. 2d 879 (D. C. Cir. 1963) *with McLindon v. United States*, 329 F. 2d 238 (D. C. Cir. 1964). Here, however, the prosecution contended, and the Third Circuit held, that Smith's identity had been discovered from independent sources prior to the illegal search, and thus was admissible because there had been no exploitation of official illegality, citing *Costello v. United States*, 365 U. S. 265, 280 (1961); *Burke v. United States*, 328 F. 2d 399, 420 (1st Cr. 1964), *cert. den.* 379 U. S. 849 (1964); *Coplon v. United States*, 191 F. 2d 749 (D. C. Cir. 1951), *cert. den.* 342 U. S. 926 (1952). Even if this were correct, this Court should determine whether the answer of the witness precluded the use of his testimony.

(b) *Goetz:* Another witness, who was one of the individuals found on the premises at the time of the raid, was called to testify, and the prosecutor stated at side-bar that the witness had been known prior to the raid and that he had not given any statement at the time of the raid. On the basis of this statement the defense counsel's objection was overruled, and the witness was permitted to testify. After the witness had testified and disclosed that he had given statements at the time of the raid, defense counsel was permitted to conduct a voir dire out of the presence of the jury, during which cross-examination he testified that he would have given a statement even if he had not been seen at the raid (Appt. Append. 441a). However, from the circumstances surrounding the raid and interrogation of that witness, it became evident that his statements and identity were obtained as a direct result of the government's unlawful conduct. All of the occupants of the building were required to hold their hands over their heads for a considerable period of time; but this witness could not do so because he was suffering from broken ribs, so he notified one of the agents who permitted him to lower his hands. The agent then asked him questions but did not advise him of his right not to make a statement, nor of his right to consult an attorney. The illegality of his detention

and coercive nature of the entire raid and his interrogation is readily apparent from a reading of the record. This Court should not permit such testimony to be used, since it was obtained by exploitation of official illegality. Petitioners are not attempting to assert another's constitutional rights; thus, they do not lack standing to raise this question under *Jones v. United States*, 362 U. S. 257, 261-262 (1960), as concluded by the Third Circuit. On the contrary, they are raising questions as to how far their own constitutional rights, protected by the trial judge's ruling on the pretrial motion, do extend.

(c) *La Battaglia and Thomas:* Two additional witnesses were arrested or detained as they were walking out the door of the premises as the FBI agents entered to make the raid which was subsequently held to be illegal. It is true that the trial judge ruled that the unannounced entry into the inner door rendered the search unlawful, and these witnesses had already passed through the outer door prior to the breaking of the inner door. The trial court did not pass upon other allegations of illegality of the entire raid. However, even without passing on such contentions, the witnesses were discovered, illegally detained, and their testimony was obtained as a result of the illegal conduct of the government under the totality of the circumstance. The witnesses were arrested or detained while still on the premises and within the curtilage. This is not a situation where officers on public property, or on private property with permission, observed activity and then made a lawful arrest or detention as a result of their observations. The officers here were on the premises illegally in the process of illegally enforcing warrants improperly obtained.

(d) *Grassi:* An FBI agent was permitted to testify about interviewing one of the defendants (Grassi) on February 1, 1962, subsequent to the raid. While the trial judge instructed the jury that the statement would be binding only

as to defendant Grassi (since made after the termination of the conspiracy), it overruled an objection on the ground that the substance of the statement would implicate other defendants and that the identity of defendant Grassi could not have been discovered but for the illegal raid. On *voir dire* it was learned that the FBI had obtained from a "confidential informant" who was present at the raid, the nickname "Snorky," which nickname was later checked with Camden police and they learned that it referred to defendant Grassi. However, FBI agent Walker admitted that although he had previously known that "confidential informant" and obtained information from him on other matters, he had never gotten information about this game until after the raid. Since the trial court refused to force the government to disclose the identity of the informant, it was impossible for defendants to cross-examine to determine whether the informant would have given the information had it not been for the raid.

At the request of defense counsel, the trial court did instruct the jury that the testimony about Grassi's statement would be admissible only against Grassi, and that the testimony should not be considered against the others named in the statement (Appt. Append. 223a). Nonetheless, the purpose of the prosecution in introducing the statement could only have been to produce evidence against the other defendants (including Petitioner Pillo) who were mentioned therein, since the statement was self-serving or exculpatory as to defendant Grassi. In fact, Grassi was acquitted by the jury. Thus, the statement was prejudicial to the other defendants, including Petitioner. See *Tripp v. United States,* 295 F. 2d 418 (10th Cir. 1961).

6. The Trial Court Should Have Granted a New Trial and Severance.

Before the trial began, each of the defendants moved for a severance. This was granted as to one defendant

(charged only with conspiracy), but was denied as to each of the other defendants.

During the trial evidence was admitted as to some of the defendants which was inadmissible as to others and prejudicial to them. For example, there was testimony that one of the defendants (Marzilli, not a Petitioner) made a statement that the "new law being pushed by Bobby Kennedy" concerning the interstate nature of the enterprise (Appt. Append. 107a). This was highly prejudicial to all of the defendants, since it bore directly on the question of intent and knowledge. Even an instruction by the Judge that it should be limited to that defendant alone could not and did not wipe from the jury's mind the implication that the other defendants must have known about the law. In addition, the statement by defendant Grassi, referred to above, was damaging to other defendants, including at least one of the Petitioners.

There can be no question but that the trial judge properly and frequently exhorted the jury at various stages in the proceedings to consider each defendant individually. The judge was scrupulously fair in his conduct of the trial, and accorded to defendants every procedural protection which was possible. Furthermore, the jury apparently did attempt to consider the evidence against each defendant individually, since it did acquit one defendant entirely and found all of the defendants charged therein not guilty on three substantive counts. However, it is respectfully submitted that it was impossible for the jurors to wipe from their minds all of the evidence which was excluded or limited. In fact, even counsel reviewing the printed record at leisure finds it impossible to compartmentalize the evidence completely. The jury was faced with the impossible task of distinguishing those defendants charged in substantive counts with traveling or transportating others across state lines, from those defendants charged with aiding and abetting, and with distinguishing the evidence relating to those charges from the evidence relating to the existence

of conspiracy. There can be little doubt that the jury simply took the easy way out by finding all of the defendants guilty of conspiracy, regardless of their participation in the entire scheme of operation. This impossibility is highlighted by the fact that the trial judge subsequently granted a new trial to those charged with aiding and abetting; although this resulted from the inadvertent omission by the trial judge of one element in the charge of aiding and abetting, it is quite likely that the jury was completely confused as to the distinction between the elements involved in aiding and abetting and those involved in conspiracy. It is further highlighted by the fact that the Court of Appeals concluded that the evidence was completely insufficient to sustain the conviction of one defendant (Bonanno).

Thus, the belief in the fiction that jurors are able to segregate such evidence in their minds and to exclude inadmissible evidence upon instruction during long joint trials, such as has been so roundly criticized in so many judicial opinions, is stretched to the limit here. See *Delli Paoli v. United States,* 352 U. S. 232, 246 (1957) (dissent); *Jackson v. Denno,* 378 U. S. 368, 388, 389 (1964); *People v. Aranda,* 63 Cal. 2d 518, 407 P. 2d 265 (1965); *State v. Young,* 46 N. J. 152, 215 A. 2d 352 (1965); *United States v. Bozza,* 35 U. S. L. Week, 2114 (2d Cir. Aug. 1, 1966). Also see 78 HARV. L. REV. 211, 213 (1964).

This Court has emphasized a trial judge's "continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States,* 362 U. S. 511, 516 (1960). Accordingly, even if the trial court did not abuse its discretion in refusing a severance in advance of the trial, certainly when requested by each of the defendants at the close of the evidence, the prejudice did appear, and the trial court should have granted a new trial and a severance so that each defendant could be tried free of such prejudice.

7. Grand Jury Testimony Was Used Improperly to Cross-Examine One Witness and as "Past Recollection Recorded" of Another.

One of the chief witnesses against the defendants was a witness named Wacks who had told the prosecutor shortly before trial that he did not want to testify. Despite knowledge of his reluctance, the government was permitted to plead surprise and to cross-examine its own witness, utilizing his testimony given before the grand jury. For example, on one occasion Wacks was examined about the participation of Petitioner Barrow in settling disputes (Appt. Append. 127a-129a). Even though the testimony was simply inconclusive and vague, and the witness when shown the grand jury testimony claimed that it did not refresh his recollection, and could not say affirmatively that it was true when given before the grand jury (Appt. Append. 129a-134a), the prosecutor was permitted to plead surprise and to cross-examine from the grand jury testimony concerning this incident (Appt. Append. 151a-155a). Finally, on examination by the judge, the witness did describe the alleged incident (Appt. Append. 156a-158a). On still another occasion the witness was examined as to who brought the money to the table to open the game (Appee. Append. 143b); when he stated he was unable to recall, he was shown his grand jury testimony allegedly to refresh his recollection (Appee. Append. 165b-170b), and then the grand jury notes were utilized to cross-examine him (Appee. Append. 171b-173b). This occurred on several occasions, and each time the grand jury notes supplied evidence which was damaging to defendants. (As noted, the above references to Petitioner Barrow were the main references upon which his conviction is based.) On several occasions the defense objected to the Government's plea of surprise and the use of the grand jury testimony, requested that the statements made before the grand jury be stricken and that the jury be instructed that this was

not substantive evidence. These requests were generally refused (see Appt. Append. 162a, 168a-172a, 175a-177a, 180a-181a), except on one occasion where the testimony was stricken because of the witness' inability to identify the subject as being one of the defendants (Appee. Append. 170b-171b; Appt. Append. 134a-135a; 136a; 139a-151a; *compare* 177a-182a with Appee. Append. 188b-190b). In one instance the jury was instructed as to the effect of striking that testimony (Appt. Append. 181a-182a).

In their points for charge, defendants requested that the jury be instructed that the testimony given before the grand jury not be considered as substantive evidence. Such an instruction was not given by the Court. Concededly, no exception to the charge was taken by defendants. However, it is not the failure of the Court to charge which is being urged as error; rather it is the admission into evidence of the grand jury testimony, both questions and answers, which is submitted was error.

At one point in the trial, the prosecutor was permitted to cross-examine one of the government's witnesses named DiGaetano about alleged co-conspirators, and to use his grand jury testimony as a past recollection recorded (N. T. 1422 *et seq.*). On this occasion there was absolutely no basis for a plea of surprise since the witness had not testified in a manner contrary to his testimony before the grand jury; apparently he had simply forgotten. Nonetheless, the court permitted the prosecutor to cross-examine from the grand jury testimony, which took place March 8, 1962, even though the events had taken place prior to January 20, 1962. Not only was the testimony obviously not contemporaneous with the event, as required to constitute a past recollection recorded, but the witness had been questioned before the grand jury on two occasions, on both testifying completely inconsistently. Yet, he testified that "everything that is in the book" (meaning the notes of testimony) was true. Since these were internally inconsistent, none can be taken as an accurate past recollec-

tion recorded. At any rate, the witness admitted on the stand to being a liar (Appee. Append. 229b).

Since the above testimony all related to evidence highly prejudicial to these Petitioners, if the trial court erred in its ruling, the Petitioners were deprived of a fair trial.

CONCLUSION.

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15093 to 15097

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE BARROW
BENNY BONANNO
FRED DiPATRIZIO
JOSEPH MATTIA
PASQUALE PILLO,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 14, 1965

Before BIGGS, *Chief Judge,* and KALODNER and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 18, 1966)

By SMITH, *Circuit Judge.*

The appellants were tried by a jury and convicted on the first count of a multiple count indictment charging them

with conspiracy to violate § 1952 of Title 18 U. S. C. A. Pillo and DiPatrizio were also convicted on each of three counts charging substantive offenses. The present appeals are from the judgments entered on the jury verdicts.

The pertinent provisions of the statute with which we are here concerned read as follows:

> "(a) Whoever travels in interstate . . . commerce or uses any facility in interstate . . . commerce, . . . , with intent to—
>
> . . . .
>
> (3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs . . . (3), shall be fined . . . or imprisoned . . . , or both.
>
> "(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, . . . , in violation of the laws of the State in which . . . committed . . . ."

Facts

Between the middle of November 1961, and the middle of January 1962, the appellants were engaged in various capacities in the operation of a gambling casino at 237 Cherry Street, Reading, Pennsylvania, in violation of State laws, 18 P. S. §§ 4603, 4605 and 4606. The casino, furnished and equipped as a dice room, occupied the entire ground floor of a commercial building.

Sufficiency of Evidence

The appellants maintain that the evidence was insufficient to support their convictions on the charge of conspiracy. Pillo and DiPatrizio also urge that the evidence was insufficient to support their convictions on the substan-

tive charges. It is conceded that there was ample proof that they had been engaged in gambling operations in violation of State law. However, the appellants argue that the evidence was insufficient to support the conclusion that they had violated the federal statute.

We think it advisable to state at the outset the general principles by which we must be guided in passing on the sufficiency of the evidence relating to the charge of conspiracy.

The crime of conspiracy, as defined in § 371 of Title 18 U. S. C. A., is seldom susceptible of proof by direct evidence. Proof of the crime may rest as it frequently does, on indirect or circumstantial evidence. The existence of a conspiracy may be inferred from evidence of related facts and circumstances from which it appears, as a reasonable and logical inference, that the activities of the participants in the criminal venture could not have been carried on except as the result of a preconceived scheme or common understanding. *Glasser v. United States,* 315 U. S. 60, 80 (1942); *United States v. Amedeo,* 277 F. 2d 375 (3rd Cir. 1960); *United States v. Monticello,* 264 F. 2d 47 (3rd Cir. 1959); *United States v. Migliorino,* 238 F. 2d 7 (3rd Cir. 1956).

There was substantial evidence from which the jury could have found that Pillo, DiPatrizio and Mattia travelled regularly from their homes in New Jersey to the casino in Reading, where they were employed as "ladder men." Each of them was stationed at a dice table as an overseer and, as such, "facilitated" the games as they progressed. As overseers their principal function was to police the games on behalf of the "house." The evidence was more than sufficient to support the jury's determination that Pillo and DiPatrizio were guilty of the substantive offenses and that they and Mattia were involved in the conspiracy.

While there was no direct evidence that Barrow knew of the interstate aspects of the gambling enterprise, there was ample circumstantial evidence from which the jury could have inferred that he did. There was evidence from

which the jury could have found that Barrow managed and promoted the gambling operations. He generally supervised the employees, including those who came from New Jersey; he was the final arbiter of disputes relating to the roll or call of the dice; he made the final decision when any question arose as to whether a prospective patron should be admitted to the casino; he provided "house money" when the dice game began and removed excess cash from the table as play continued; and, he was in almost daily association with the employees. At times Barrow was assisted by Mattia in the performance of his many duties. A more complete summary of the evidence relating to Barrow is contained in the opinion of the court below. 229 F. Supp. 722, 726.

We believe that the evidence as a whole, viewed in the light most favorable to the prosecution, was susceptible of a reasonable and logical inference that Barrow, as manager and promoter, was fully aware of the scope of the illegal enterprise, including its interstate aspects. See *United States v. Palladino*, 203 F. Supp. 35, 41 (D. C. Mass. 1962). The inference was not only justified, it was almost inescapable. It is inconceivable that Barrow would have placed employees like Pillo, DiPatrizio and Mattia in positions of trust without knowing who they were and where they came from.

The evidence relating to Bonanno's participation in the conspiracy is summarized in the opinion of the court below. 229 F. Supp. 722, 727. We think that this evidence was insufficient to warrant the submission of the issue of his guilt to the jury.

The appellants, relying on *United States v. Honeycutt*, 311 F. 2d 660 (4th Cir. 1962), argue that the Government was required to prove that the interstate travel was an integral part of and essential to the gambling operations. The cited case does not support this argument. The enactment prohibits in the broadest terms interstate travel with the requisite intent followed by the performance or attempts

to perform any of the acts specified in subparagraphs (a)(3), *supra*. There is nothing therein which limits its application to interstate travel *essential* to the unlawful activity. See *Bass v. United States*, 324 F. 2d 168 (8th Cir. 1963).

CONSTITUTIONALITY OF STATUTE.

The appellants contend that the statute, as applied to the facts in this case, is unconstitutional. This contention is predicated on the premise that the gambling enterprise here is question was a local activity beyond the reach of Congressional authority. It is argued that the federal enactment constituted an encroachment upon the powers reserved to the States under the Tenth Amendment. The question raised by this argument was fully discussed by the trial judge, 212 F. Supp. 837, and we agree with his well reasoned opinion. Moreover, there are other cases in which arguments similar to the one advanced here were rejected as without merit. *United States v. Zizzo*, 338 F. 2d 577 (7th Cir. 1964), cert. den. 381 U. S. 915; *United States v. Ryan*, 213 F. Supp. 763 (D. Colo. 1963); *United States v. Smith*, 209 F. Supp. 907, 915-916 (E. D. Ill. 1962). We add but one comment: The Tenth Amendment does not operate as a limitation upon the powers delegated to the Congress by the Commerce Clause, Art. 1, § 8, cl. 3. *Fernandez v. Wiener*, 326 U. S. 340, 362 (1945); *United States v. Dougherty*, 312 U. S. 100, 124 (1941).

The appellants further argue that the statute is vague and therefore unconstitutional. We find this argument likewise without merit. *Bass v. United States, supra*, p. 172; *Turf Center, Inc. v. United States*, 325 F. 2d 793, 795 (9th Cir. 1964).

ADMISSIBILITY OF TESTIMONY.

At the trial the Government called as a witness one M. Earl Smith, a patron of the casino, who was permitted to testify over the timely but somewhat ambiguous objec-

tion of defense counsel. The appellants urge that since the identity of the witnesses was learned as a result of an illegal search,[1] his testimony was inadmissible under the exclusionary rule of *Wong Sun v. United States,* 371 U. S. 471, 487-488 (1963).

There was ample evidence that the identity of Smith had been ascertained from independent sources prior to the illegal search. Smith was admittedly a frequent visitor to the casino and had been observed by federal agents on at least four occasions as he either entered or left the premises in the company of one Bechtel; in fact, on these occasions he and Bechtel were photographed. The agents learned from personal observation and a check of public records that Smith was the owner of a black Lincoln which was registered to him at his home address in Reading. On the occasions when Smith visited the casino this vehicle was seen in either of two parking lots located near the premises. At 11:05 P. M., on January 19, 1962, approximately two hours prior to the illegal search, Smith was again observed entering the casino in the company of Bechtel. By this time the identity of Smith was well known to the agents.

Assuming, but not deciding, that the "fruit of the poisonous tree" doctrine may be invoked to bar the testimony of a witness whose identity is learned as a result of an illegal search, it is inapplicable to the facts of the instant case. The doctrine "excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an 'independent source.'" *Costello v. United States,* 365 U. S. 265, 280 (1961), citing *Silverthorne Lumber Co. v. United States,* 251 U. S. 385, 392 (1920). The information as to Smith's identity was gained from personal observation and did not become unusable merely because the same information was subsequently

1. After several weeks of surveillance the federal agents, armed with arrest warrants, forced their way into the casino. The witness Smith was found on the premises. The court below found that the execution of the warrants and the search which followed were illegal. We find it unnecessary to consider the alleged illegality of the search.

discovered during the illegal search. *Burke v. United States,* 328 F. 2d 399, 420 (1st Cir. 1964), cert. den. 379 U. S. 849; *Coplon v. United States,* 191 F. 2d 749 (D. C. Cir. 1951), cert. den. 342 U. S. 926. Absent any exploitation of the illegality, the testimony of Smith was clearly admissible.

Also called as witnesses were Leonard Labattaglia and Walter Thomas, casino patrons who were detained upon leaving the premises *prior* to the illegal entry by the agents. When their identity was ascertained they were permitted to leave. The appellants assert that since the identity of the witnesses was discovered as the result of an illegal detention their testimony was inadmissible. Even if the detention was illegal, the appellants lacked standing to challenge it. *Cf. Jones v. United States,* 362 U. S. 257, 261-262 (1960).

The appellants contest the propriety of the court's action in admitting the testimony of a federal agent concerning a post-conspiracy interview with one Rocco Grassi, who was named in several counts of the indictment but acquitted. At the conclusion of this testimony the court carefully admonished the jury that the statements made by Grassi during the interview could be considered only in his case and not in that of any other defendant. There was clearly no error in the admission of the agent's testimony. *United States v. Miller,* 340 F. 2d 421 423 (4th Cir. 1965); *United States v. Viale,* 312 F. 2d 595, 602 (2nd Cir. 1963), cert. den. 373 U. S. 903; *Castro v. United States,* 296 F. 2d 540, 542 (5th Cir. 1961). We should add that the statements made by Grassi during the course of his interview were not prejudicial to any of the appellants; they implicated only Frank Loscalzo, a defendant who was acquitted.

Use of Grand Jury Testimony.

The prosecution called as a witness one Charles Wacks, an habitué of the casino, who suffered from what may be described as convenient lapses of memory. When it became apparent that the testimony of this witness was vague and

evasive the trial judge permitted the use of portions of his grand jury testimony for the purpose of refreshing his recollection. A similar use of grand jury testimony was made in the examination of Joseph DiGaetano. The appellants contend that the action of the court was error.

It has been firmly established since *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 233 (1940) that the "use of grand jury testimony for the purpose or refreshing the recollection of a witness rests in the sound discretion of the trial judge." *United States v. Weinberg*, 226 F. 2d 161, 168 (3rd Cir. 1955), cert. den. 350 U. S. 933; *Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Florida*, 323 F. 2d 233, 238 (5th Cir. 1963). We find no abuse of discretion in the instant case.

In the few instances in which the grand jury testimony failed to refresh the memory of the witnesses, portions of it were received as evidence of past recollection recorded. This was not an improper use of such testimony. *United States v. Riccardi*, 174 F. 2d 883 (3rd Cir. 1949); 3 WIGMORE ON EVIDENCE, § 754, 755 (3rd Ed. 1940).

Several other questions are raised as to the admissibility of evidence. We have considered them and find that they are frivolous and without merit.

The appellants assign as error the alleged failure of the trial judge to adequately instruct the jury as to the limited purpose and effect of the grand jury testimony. We note that the "relevant charge" is not reproduced in the appendix as required by our rule 24(2)(e), 28 U. S. C. A., and the brief contains no citation to the original record. This defect would warrant a dismissal of the assignment without consideration. *Marcinak v. West Indies Investment Company*, 299 F. 2d 821 (3rd Cir. 1962); *Gendron v. United States*, 295 F. 2d 897 (8th Cir. 1961). However, we prefer to dispose of the matter on other grounds.

If there was any deficiency or omission in the instructions given it was incumbent upon the appellants to note a timely objection "stating distinctly the matter to which

[they objected] and the grounds of [their objection.]" FED. RULES CR. PROC. rule 30, 18 U. S. C. A. *United States v. Provenzano,* 334 F. 2d 678, 690 (3rd Cir. 1964), cert. den. 379 U. S. 947. This was not done; in fact, there was but one objection to the court's instructions and this was clearly not germane to the question raised by the present assignment of error. Absent timely objection or a request for specific instructions, the alleged deficiency in the court's charge may not be assigned as error. Rule 30, *supra; Richards v. United States,* 329 F. 2d 188 (5th Cir. 1964), cert. den. 379 U. S. 854; *Berry v. United States,* 271 F. 2d 775 (5th Cir. 1959), cert. den. 362 U. S. 903; *United States v. Bookie,* 229 F. 2d 130, 135 (7th Cir. 1956).

MOTION FOR SEVERANCE AND FOR SEPARATE TRIALS.

The appellants complain of the denial of their respective pretrial motions for severance and separate trials made under Fed. Rules Crim. Proc., rule 14, 18 U. S. C. A. We find no merit in this complaint. It is well settled that such motions are addressed to the sound discretion of the trial judge and his decision thereon will not be reversed in the absence of an affirmative showing of an abuse of discretion. *United States v. Gardner,* 347 F. 2d 405, 406 (7th Cir. 1965); *United States v. Miller, supra; Milam v. United States,* 322 F. 2d 104, 110 (5th Cir. 1963), cert. den. 377 U. S. 911; *Fisher v. United States,* 324 F. 2d 775, 780-781 (8th Cir. 1963), cert. den. 377 U. S. 999. We find no abuse of discretion in the case before us.

Lastly, the appellants maintain that the denial of their respective motions for a new trial was reversible error. It is argued that the joint trial was prejudicial. We are convinced from our examination of the record that the trial was fairly conducted. Indeed, this is conceded in the appellants' brief.

The charge of prejudice appears to rest on the supposition that the jury was confused. Apposite is the statement in *Opper v. United States,* 348 U. S. 84, 95 (1954):

"It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of such discretion when petitioner's motion for severance was overruled .... To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial."

The judgments of the court below as to all the appellants, except Bonanno, will be affirmed. The judgment as to Bonanno will be reversed and his case will be remanded with an instruction to enter a judgment of acquittal.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,093

UNITED STATES OF AMERICA

v.

GEORGE BARROW, a/k/a "SKINNY BARRETT",
Appellant

(D. C. Criminal No. 20997)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, KALODNER and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern Distrfict of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed September 3, 1964 as amended November 18, 1964, be, and the same is hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON,
Deputy Clerk.

July 18, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,095

UNITED STATES OF AMERICA

v.

FRED DI PATRIZIO, a/k/a "FLIVVIE THE FISH," a/k/a "WHISPERS",

Appellant

(D. C. Criminal No. 20997)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, KALODNER and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed September 3, 1964 as amended November 18, 1964, be, and the same is hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON,
Deputy Clerk.

July 18, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,096

UNITED STATES OF AMERICA

v.

JOSEPH MATTIA, a/k/a "GASSY",
Appellant

(D. C. Criminal No. 20997)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, KALODNER and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed September 3, 1964 as amended November 18, 1964, be, and the same is hereby affirmed.

ATTEST:

M. ELIZABETH FERGUSON,
Deputy Clerk.

July 18, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,097

UNITED STATES OF AMERICA

v.

PASQUALE PILLO, a/k/a "HUSKY,"
Appellant

(D. C. Criminal No. 20997)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, KALODNER and SMITH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed September 3, 1964 as amended November 18, 1964, be, and the same is hereby affirmed.

ATTEST:
M. ELIZABETH FERGUSON,
Deputy Clerk.

July 18, 1966

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15093, 15095, 15096, 15097

UNITED STATES OF AMERICA,
Appellee,

v.

GEORGE BARROW, FRED DiPATRIZIO, JOSEPH MATTIA AND PASQUALE PILLO,
Appellants.

ORDER
SUR PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge,* MCLAUGHLIN, KALODNER, STALEY, HASTIE, GANEY, SMITH, FREEDMAN and SEITZ, *Circuit Judges.*

The petition for rehearing filed by

GEORGE BARROW
FRED DiPATRIZIO
JOSEPH MATTIA
PASQUALE PILLO

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
WILLIAM G. SMITH,
Judge.

Dated: August 30, 1966